No. 646

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

MARTHA H. OLIN, as Administratrix of the Estate of Walter G. Olin, Deceased,
Petitioner and Appellant below,

vs.

NEW ENGLAND LIFE INSURANCE COMPANY OF BOSTON, MASS.,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT
AND
BRIEF IN SUPPORT THEREOF

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ARTHUR R. ROBINSON, JR.,
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Central Publishing Company, Indianapolis, Ind.

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Martha H. Olin, as administratrix of the Estate of Walter G. Olin, deceased, respectfully petitioning shows to the Court:

I

SUMMARY STATEMENT OF MATTERS INVOLVED

A. Nature of the action and Judgment below.

Respondent filed this suit in equity against the petitioner, in the District Court for the Southern District of Indiana,

at Indianapolis; and by its amended bill of complaint sought a declaratory judgment of the rights, duties and obligations under a certain policy of insurance in the principal sum of Ten Thousand ($10,000) Dollars, issued by the respondent upon the life of Walter G. Olin, deceased. (R. 1, 10.)

Petitioner filed answer in two paragraphs to respondent's amended bill of complaint; (R. 10, 23) and counterclaim in one paragraph seeking coercive judgment against the respondent for the face amount of the policy and dividends with interest thereon, less the policy loan indebtedness, with interest, owing by the insured at the time the policy lapsed for non-payment of premium; on the theory that respondent's liability on the policy continued until after the insured's death under the automatic extended insurance provisions of the policy. (R. 23, 29) Respondent filed answer in one paragraph to the counterclaim. (R. 29, 36.)

The evidence in the cause was submitted by way of a stipulation of an agreed statement of facts and exhibits. (R. 36, 74) Upon the evidence thus introduced the cause was submitted to the Court for trial. (R. 36.)

The court, adopted the stipulation of the parties as its Special Findings of Fact (R. 37), and stated its Conclusion of Law thereon in favor of respondent on its amended complaint and against petitioner on her counterclaim. (R. 74, 75.)

The District Court rendered judgment for the respondent—for respondent on the complaint and against the petitioner on the counterclaim, as follows:

> "It is therefore ordered, adjudged and decreed by the Court, and the Court declares that the rights,

duties, and relations of the parties hereto are as follows:

That the plaintiff, New England Mutual Life Insurance Company of Boston, Massachusetts, has no duty, obligation, or liability whatsoever under its policy of insurance issued September 29, 1922, in the sum of Ten Thousand Dollars ($10,000) upon the life of Walter G. Olin, and that said policy is terminated, and that the defendant surrender said policy to the plaintiff.

That the defendant, Martha H. Olin, as Administratrix of the estate of Walter G. Olin, deceased, take nothing under her counterclaim.

That the plaintiff recover of and from the defendant its costs taxed at $....." (R. 75.)

No opinion was written by the District Court.

From the judgment of the District Court the respondent appealed to the United States Circuit Court of Appeals, for the Seventh Circuit.

B. The Circuit Court of Appeals, in its opinion, held that the policy and the supplementary loan agreements, were Indiana contracts governed by the applicable Indiana law; (R. 104, 106) that at the time the policy lapsed for non-payment of premium the total cash value of the policy was $1,577.60 and that the total indebtedness chargeable against the policy, including interest to date of default, was $1,572.30 (R. 102); that under the terms of the policy and the applicable Indiana law the insured was entitled to extended insurance for the term stated in the table of values, for the face of the policy reduced by the amount of the indebtedness, and that the amount of the extended insurance may be reduced in the ratio that the indebtedness bore to the cash value of the policy at date of lapse (R. 109, 111);

and reversed the District Court and remanded the cause for further proceedings in conformity with its opinion. (R. 112.)

The opinion of the Circuit Court of Appeals is reported in 114 F. 2d 131, 140.

The petitioner filed her petition for a rehearing within the time allowed (R. 113) which was denied by the Circuit Court of Appeals, on September 25, 1940, without opinion. (R. 115.)

II

JURISDICTION

The Jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C-220 (43 Stat. 938; 28 U. S. C. Sect. 347). The decree of the Circuit Court of Appeals on the merits of the case was entered, a petition for rehearing was filed within the time allowed by the rules of said court, to wit: on July 30, 1940, and was denied without opinion on September 25, 1940. (R. 115) This petition for certiorari was filed before the expiration of three months from September 25, 1940.

III

STATEMENT OF FACTS

(a) Respondent is a Massachusetts corporation engaged in the life insurance business, and was licensed to transact its business in the State of Indiana. (R. 37-38.)

(b) Petitioner is the administratrix of the estate of Walter G. Olin, deceased. (R. 38.)

(c) On September 26, 1922, Walter G. Olin executed and delivered to the office of respondent's general agent in In-

dianapolis, Indiana, his written application for a policy of ordinary life insurance, upon his life, in the sum of Ten Thousand ($10,000) Dollars. (R. 38-46, 47.)

(d) Respondent's general agent forwarded the insured's application to the respondent's home office in Boston, Massachusetts; where said application was received, accepted and approved on September 29, 1922. (R. 38.)

(e) In consideration of the insured's said application and the payment of an annual premium of Three Hundred Seventeen ($317) Dollars on September 29th of each year, the respondent executed its ordinary life policy of insurance No. 460435, insuring the life of said Walter G. Olin in the sum of Ten Thousand ($10,000) Dollars. (R. 38, 39-49, 54.)

(f) Respondent's home office mailed said policy to its general agent in Indianapolis, Indiana, on or about October 2, 1922, who delivered same to the insured, in said city, on or about October 5, 1922, at which time the insured paid said general agent the first annual premium. (R. 38, 39.)

(g) The insured's estate was named beneficiary in said policy at the time of the insured's death. (R. 39.)

(h) The policy contained provisions for cash loans on the sole security of the policy, and for automatic premium loans. (R. 51.)

(i) The policy also contained the usual non-forfeiture provisions giving the insured the option, after payment of three annual premiums, to (a) surrender the policy for its cash value, less any indebtedness thereon or secured thereby, (b) to take paid-up insurance for such an amount as the cash value, less any indebtedness secured by the policy, would purchase as a net single premium and (c)

to have the policy continued as extended insurance for its face amount, less any indebtedness on or secured by the policy, for such time as the cash value would purchase such extended insurance when applied as a net single premium. (R. 52, 53.)

(j) The policy also contained a table of values indicating that the cash or loan value of the policy after payment of nine full annual premiums was $1,577.60; and that the cash reserve of the policy, after payment of nine full annual premiums, would continue the policy as participating extended insurance for 11 years and 178 days after date of default. (R. 54) The policy stipulates that the values set out in said table are equivalent to the full policy reserve, and that said values would be increased by the value of any additions or accumulations at interest, and decreased by any indebtedness on the policy. (R. 53.)

(k) On October 30, 1926, the insured executed a premium loan agreement (R. 57) authorizing the respondent company to charge against the policy reserves the amount of any annual premium not paid within the period of grace, and the company did make such loans aggregating, with interest, Twelve Hundred Fifty-eight Dollars and Seventy-one cents ($1,258.71) on February 27, 1931. (R. 39, 40.)

(l) On February 27, 1931, the insured obtained from respondent a policy loan of Fifteen Hundred Twenty ($1,520) Dollars under a written loan agreement (R. 62, 63) providing for interest on said loan at six (6%) per cent per annum, payable semi-annually on the 15th day of March and September, and providing that if such interest was not paid when due it should be charged to the principal to bear interest at the same rate; and from the proceeds of said policy loan respondent deducted the prior indebtedness

charged against the policy in said sum of $1,258.71. (R. 40, 41.)

(m) The interest on said policy loan, in the sum of Forty-eight Dollars and Sixty-four cents ($48.64), which matured September 15, 1931, was not paid when due, and respondent charged said interest to the policy indebtedness. (R. 41.)

(n) Nine full annual premiums were paid on said policy; and the tenth annual premium due September 29, 1931 was never paid. (R. 41.)

(o) The total cash surrender value of the policy when it lapsed on September 29, 1931, was Fifteen Hundred Seventy-seven Dollars and Sixty Cents ($1,577.60). (R. 41.)

(p) When the policy lapsed on September 29, 1931, there was standing to the credit of the policy, and due the insured, a dividend or share of surplus earnings of the company, in the sum of Ninety-five Dollars and Fifty Cents ($95.50). (R. 41.)

(q) When the policy lapsed on September 29, 1931, the total indebtedness chargeable against the policy, including interest from September 15, 1931, to September 29, 1931, the date of lapse, was Fifteen Hundred Seventy-two Dollars and Thirty Cents ($1,572.30). (R. 102.)

(r) At the expiration of the period of grace for payment of the tenth annual premium on said policy (payment of which was defaulted by the insured) respondent computed the cash value of the policy, and interest on the policy loan indebtedness, to March 8, 1932, and by such computations found that the indebtedness was Forty-eight Dollars and Twenty Cents ($48.20) less than the cash value of the policy as of said March 8, 1932. Respondent then

charged said difference of $48.20 against the policy reserves as an automatic premium loan, and applied said sum of $48.20, and the dividend of $95.50 standing to the credit of the policy, toward payment of a portion ($143.70) of said tenth annual premium; and continued said policy in force until March 8, 1932. (R. 42.)

(s) The respondent company mailed said policy, marked "cancelled," to the insured on April 8, 1932. (R. 43.)

(t) The insured died on February 6, 1936. (R. 43.)

(u) On March 3, 1936, petitioner notified respondent of the insured's death and demanded payment of the proceeds of the policy. (R. 43.)

(v) The respondent denied liability on the policy by their letter to petitioner's attorney dated March 5, 1936, (R. 43, Exhibit "K"-R. 68) and respondent never requested other or further proof of death of the insured. (R. 43.)

IV

THE QUESTIONS PRESENTED

The questions presented by the opinion of the Circuit Court of Appeals, the record, and this petition for the writ of certiorari are:

First. Whether or not the insured's indebtedness to (the insurer) respondent, secured by the policy, at the time it lapsed for nonpayment of premium, was deductible from the cash reserve value of the policy in computing the extended insurance benefit under the insurance contract.

Second. Whether or not the Circuit Court of Appeals can lawfully substitute the Indiana statutory rule for computing the extended insurance benefit under the policy for

the more favorable rule set out in the policy for computing said benefit, and thus deprive the insured of approximately ninety-nine (99%) per cent of his contract bargain.

Third. Whether the Circuit Court of Appeals refused to follow the applicable Indiana law, in violation of the rule established by this court in Erie Railroad Company v. Tompkins, 304 U. S. 64.

Fourth. Whether the Circuit Court of Appeals refused to search for and apply the entire body of the substantive law of Indiana governing an identical action in the state courts, in violation of the rule established by this court in Ruhlin v. New York Life Ins. Company, 304 U. S. 202.

Fifth. Whether or not the Circuit Court of Appeals has correctly construed and applied the decisions of the Indiana courts upon which it grounds its opinion.

Sixth. Whether the decision of the Seventh Circuit Court of Appeals, in this cause, is in conflict with the decisions of the other Circuit Courts of Appeals in the matter of construction of ambiguous provisions, or doubtful language, of insurance contracts.

Seventh. Whether the decision of the Seventh Circuit Court of Appeals, in this case, is in conflict with applicable decisions of this court in the matter of construction of ambiguous provisions, or doubtful language, of insurance contracts.

Eighth. Whether the decision of the Seventh Circuit Court of Appeals, in this cause, is in conflict with the decision of the Eighth Circuit Court of Appeals in the matter of unlawful discrimination between a borrowing and a non-borrowing policy-holder.

Ninth. Whether the Circuit Court of Appeals, in its decision in this cause, has so far departed from the accepted

and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

V

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

First. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in a way that conflicts with applicable local decisions, in seven important particulars, to wit:

1. It has decided that the insured's indebtedness to the (company) respondent, secured by the policy, at the time it lapsed for non-payment of premium, was deductible from the amount of the extended insurance and, also, from the reserve value of the policy, in computing the sum available for the purchase of extended insurance; and has thus allowed the respondent a double credit for the indebtedness, contrary to the decisions of the Indiana courts in:

[1]*Waddell v. New England Mutual Life Ins. Co. of Boston, Mass.* (1924), 83 Ind. App. 209;

[2]*Metropolitan Life Ins. Co. v. Winiger,* (Ind. App., 1938), 12 N. E. 2d, 1008;

Metropolitan Life Ins. Co. v. Winiger, 215 Ind. 120.

2. In so deciding the Circuit Court of Appeals has impliedly held that the insured's indebtedness to the respondent, at the time the policy lapsed, was applicable to reduction of the amount of extended insurance in the ratio that the indebtedness bore to the cash reserve value of the policy at date of lapse; although the policy clearly provides that the policy, upon default in premium payments, will be

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[1] Reh. Den. October 8, 1924; Tr. to Supreme Ct. Den. May 22, 1925.
[2] Not reported in Indiana Appellate (official) reports.

extended for its face amount, less any indebtedness, and has thus denied the insured, and petitioner as his beneficiary, the benefit of the more favorable rule set out in the policy for computing the amount of extended insurance, contrary to the opinion of the Indiana courts in:

Waddell v. New England Mutual Life Ins. Co., 83 Ind. App. 209;

Metropolitan Life Ins. Co. v. Winiger (1938), 12 N. E. 2d 1008.

3. In so deciding the Circuit Court of Appeals has impliedly held that the (insurer) respondent may penalize the insured, by way of requiring of him a forfeiture of most all of the extended insurance value of the policy, as a prerequisite to making a loan on the policy, contrary to the opinion of the Indiana courts in:

[3]*Equitable Life Insurance Co. of Iowa v. Taylor, et al.* (1939), 106 Ind. App. 508;

[4]*Equitable Life Ins. Co. of Iowa v. Horner* (1933), 97 Ind. App. 347;

Metropolitan Life Ins. Co. v. Winiger (Ind. App.), 12 N. E. 2d 1008.

4. The decision of the Circuit Court of Appeals sanctions discrimination between policy-holders of the same class, contrary to the decision of the Indiana Appellate court in:

Metropolitan Life Ins. Co. v. Winiger, 12 N. E. 2d 1008.

5. The Circuit Court of Appeals held that the full cash value of the policy, at the time it lapsed, was not available for computation of extended insurance, by reason of the

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[3] Reh. Den. March 22, 1939—Tr. to S. Ct. Den. May 16, 1939.

[4] Reh. Den. February 2, 1933—Tr. to S. Ct. Den. July 29, 1933.

insured's indebtedness to respondent, contrary to the decision of the Indiana Appellate court in:

Equitable Life Insurance Co. of Iowa v. Taylor, 106 Ind. App. 508.

6. The Circuit Court of Appeals has construed the ambiguous provisions of the policy, and resolved the doubt arising from the language of the contract, in favor of the company instead of the insured and his beneficiary, contrary to the opinions of the Indiana courts in:

Pacific Mutual Life Ins. Co. v. Alsop (1921), 191 Ind. 638;

American Income Ins. Co. v. Kindlesparker (1936), 102 Ind. App. 445;

Masonic Accident Ins. Co. v. Jackson (1928), 200 Ind. 472.

7. The decision of the Circuit Court of Appeals conflicts with the decisions of the Indiana courts holding that where an insurance contract is so drawn as to be susceptible to two constructions, or where reasonably intelligent men, on reading same, would honestly differ as to their meaning, the court should adopt that construction most favorable to the insured, and such as will support a claim for indemnity.

Richmond Ins. Co. of N. Y. v. Boetticher (1938), 105 Ind. App. 558;

Fidelity & Casualty Co. of N. Y. v. Blount Plow Works, 78 Ind. App. 529.

In refusing to follow the above decisions of the Indiana courts the Circuit Court of Appeals violated the rule established by this court in the case of Erie Railroad Company v. Tompkins, 304 U. S. 64.

Second. The Circuit Court of Appeals apparently gave little or no consideration to the cases of Waddell v. New England Mutual Life Ins. Co., 83 Ind. App. 209, and Equitable Life Ins. Co. of Iowa v. Taylor, 106 Ind. App. 508, which were applicable decisions of the Indiana courts. The policy in suit in the Waddell case was issued by the (same insurance company) respondent, and contained substantially the same provisions as does the policy here in suit, and was a part of the substantive law of Indiana governing an identical action in the state courts. In refusing to follow these decisions, and particularly the Waddell case, the Circuit Court of Appeals violated the rule established by this court in Ruhlin v. New York Life Ins. So., 304 U. S. 202.

Third. The decision of the Seventh Circuit Court of Appeals in this cause, construes the ambiguity arising from the conflicting, inconsistent and contradictory provisions of the policy, and resolves the doubt arising from the language of the insurance contract, in favor of respondent, instead of the insured; and the decision, in this respect, is in conflict with the decisions of the Circuit Courts of Appeals of other circuits in the following cases:

Pac. Mutual Life Ins. Co. of Cal. v. Goss (C. C. A. 5th), 99 F. 2d 658, 659;

Prudential Ins. Co. of America v. King (C. C. A. 8th), 101 F. 2d 990, 991;

Aschenbruner v. U. S. Fidelity & Guaranty Co. (C. C. A. 9th), 65 F. 2d 976.

Fourth. The decision of the Circuit Court of Appeals, in this cause, is in conflict with the following decisions of this court holding that the doubt as to the intention of the parties must be resolved against the insurer, and that the

construction of insurance policies which protects the insured must prevail.

Moulor v. American Life Ins. Co., 111 U. S. 335;
Aschenbruner v. U. S. Fidelity & Guaranty Co., 292 U. S. 80.

Fifth. The decision of the Seventh Circuit Court of Appeals, in this cause, is in conflict with the decision of the Eighth Circuit Court of Appeals on the question of the legality of policy provisions which discriminate between borrowing and non-borrowing policy holders, to wit:

Great Southern Life Ins. Co. v. Jones (C. C. A. 8th), 35 Fed. 2d 122.

Sixth. It is well settled that an insurance company cannot deny liability on a policy of insurance on one ground and thereafter defend an action on the policy on a different ground, as all other defenses are deemed waived. Equitable Life Assur. Soc. of U. S. v. Winning, 58 F. 541, 546, 547; Queen Ins. Co. of America v. Strawboard Company (1920), 76 Ind. App. 47, 51; Provident Life & Accident Ins. Co. v. Fodder, et al. (1934), 99 Ind. App. 556, 560.

(a) The respondent denied liability on the policy for the reason that under its computation and action of October 30, 1931, the indebtedness equaled the cash value of the policy, (R. 35), and that the policy expired and all liability thereunder terminated on April 8, 1932. (R. 42—Exhibit "K.," R. 68) Respondent could not, therefore, have defended this action upon the grounds that it was liable for extended insurance computed according to the rule declared by the Circuit Court of Appeals in its decision; nor did the respondent make any such defense to the counterclaim, or seek such relief under its complaint.

The decision of the Circuit Court of Appeals, therefore, amounts to granting to respondent a defense not made by,

or available to, it and grants the respondent relief not prayed for in its complaint.

(b) The Circuit Court of Appeals held that the application of the net cash value (reserve less the indebtedness) of the policy to the purchase of extended insurance was sound and consistent with settled insurance practices (R. 110) and thus charged the insured with knowledge of what sound and settled insurance practices were, and that he contracted with respect thereto, of which there is no evidence in the record.

In so deciding the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Seventh. Four important public questions are involved, viz:

(A) Whether citizens of a state may, by judicial decree which places a strained construction upon the laws of the state, be denied the protection of the laws of the state, and particularly valid statutes enacted out of considerations of public policy.

(B) Whether courts can impair the obligation of valid and binding contracts by such a strained construction thereof as to amount to writing into such contracts provisions not clearly agreed upon by the parties.

(C) Whether courts can lawfully vary the stipulations of valid contracts by introduction of equities, custom or practices.

(D) Whether courts can lawfully vary the stipulations of positive statutes, enacted out of considerations of public policy, by the introduction of custom or practices.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7152, New England Mutual Life Ins. Co. of Boston, Massachusetts vs. Martha H. Olin, as Administratrix of the Estate of Walter G. Olin, deceased, and that the decree of said United States Circuit Court of Appeals in said cause be reversed by this Court, and that petitioner have such other and further relief in the premises as to this Court may seem just.

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